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Supreme Court of the United States

OCTOBER TERM, 1968.

No. 707

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, M. A. ROSS, AND W. H. WILKERSON,
Petitioners,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered herein on July 2, 1968.

OPINIONS BELOW.

The Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Illinois, per Napoli, *J.*, are not reported but are printed

in the Appendix hereto at pp. A 9-14, *infra*. The opinion of the Court of Appeals is reported at 397 F. 2d 541. It is also reproduced in the Appendix hereto, pp. A 1-8, *infra*.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 2, 1968. A timely petition for rehearing filed by petitioners herein was denied on August 5, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

The Milwaukee Road (Chicago, Milwaukee, St. Paul & Pacific Railroad Company), BLF&E (Brotherhood of Locomotive Firemen and Enginemen), and BLE (Brotherhood of Locomotive Engineers) entered into a tri-partite agreement regarding work assignment seniority rules. The agreement provided that it could be cancelled by any party on 30 days' notice but did not provide for the rules to become effective after such cancellation.

BLE served a cancellation notice. The NMB (National Mediation Board), whose services were invoked by BLF&E, over protests of BLE and the carrier, held the dispute to be within its jurisdiction as a "major dispute," and engaged in unsuccessful mediation. After NMB closed its file, and after the processes of the Railway Labor Act ("Act") were exhausted, Milwaukee Road submitted the dispute to the NRAB (National Railroad Adjustment Board), announced restoration of the pre-agreement working conditions, and when the BLF&E began picketing, sought an injunction in the District Court. The District Court dismissed the action as barred by the Norris-LaGuardia Act. The Court of Appeals reversed, and without

reference to the NMB decision, accepted the carrier contention that the dispute was a "minor dispute."

1. After the failure of the NMB mediation and the exhaustion of the other major dispute provisions of the Act, may a carrier submit a dispute to the NRAB, immediately thereafter unilaterally promulgate different work assignment seniority rules, and then claim a "minor dispute" as a foundation for avoiding the Norris-LaGuardia Act?

2. Was it error for the court below to disregard a finding of the NMB that the dispute was a major dispute?

3. Under the Railway Labor Act, do the "rates of pay, rules, or working conditions" set forth in a terminated agreement continue in effect until changed by agreement or in accordance with Section 6 and related provisions of the Act?

STATUTES INVOLVED.

The statutes involved are the Norris-LaGuardia Act, 29 U. S. C. §§ 101 et seq. and the Railway Labor Act, 45 U. S. C. §§ 151 *et seq.*, the relevant portions of which are set forth in the Appendix hereto at pp. A 15 to A 22, *infra*.

STATEMENT OF FACTS.

1. The Dispute.

At all relevant times on the Milwaukee Road engineers have been represented by the BLE[1] and firemen by the BLF&E. Firemen, after training, experience and examination are promoted to engineers but serve as such only when their seniority permits. Otherwise they serve as firemen.

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1. The BLE, although nominally designated defendant, supported the position taken by the railroad, and on appeal was permitted to file a brief *amicus curiae*.

Prior to November 1, 1956, on the seniority district headquartered at Three Forks, Montana, whenever an engineer's vacancy occurred it was filled by a man from the engineer's "extra board." In 1956, engineer work, but not firemen work, declined at Three Forks.

Upon request of BLE and after an authorizing vote by all firemen and engineers on the seniority district, BLE, BLF&E and the Milwaukee Road entered into the November 1, 1956 tri-partite agreement ("The Agreement"). It abolished the engineers' extra board at Three Forks. Engineers who were assigned to the extra board would work as firemen. When an engineer vacancy occurred, the senior firemen available would be called for the position.

Paragraph K of the agreement states:

> "K. This agreement effective November 1, 1956, applies only to the East Rocky Mountain Seniority District, and is subject to cancellation on 30 days written notice by any party signatory hereto." (Fdgs. ¶¶ 5-6, A 10).

On September 7, 1966, the BLE served notice on the Milwaukee Road to cancel the agreement and restore the engineers' extra board, effective October 10, 1966. The BLF&E protested the cancellation.

2. Proceedings Before the NMB and the District Court in Case No. 66 C 1812.

On October 4, 1966, the BLF&E filed an application with the NMB for its mediation services regarding cancellation of the agreement. Shortly thereafter the BLF&E filed a complaint in the district court (No. 66 C 1812) to enjoin the Milwaukee Road from cancelling the agreement until all provisions of the Act had been exhausted. On December 13, 1966, the BLE intervened as a defendant in

that action. From the time that suit was commenced until January 3, 1968, when it was dismissed without prejudice, the parties agreed to maintain the status quo.

The Milwaukee Road and the BLE opposed the BLF&E's application for mediation and advised the NMB of their position that this was not a major dispute over which the NMB had jurisdiction but was a minor dispute over which the NRAB had jurisdiction. On December 14, 1966 the NMB advised the parties that, in accordance with its past practice regarding similar notices, it was treating the notice to cancel the agreement as a notice under § 6 of the Act of an intended change in agreements affecting rates of pay, rules, or working conditions. The NMB then proceeded to exercise its jurisdiction in accordance with the major dispute provisions of the Act.

After the NMB advised the parties on November 7, 1967, that all practical methods provided in the Act for adjusting the dispute had been exhausted and that it was terminating its services under the Act, and after the expiration of the thirty-day period specified in § 5, First of the Act without the appointment of an emergency board under § 10, the BLF&E on December 11, 1967 moved to dismiss without prejudice its prior action and the district court below did so on January 3, 1968.

3. Events Following Dismissal of Action in Case No. 66 C 1812 and the Proceedings Below.

On January 3, 1968, the Milwaukee Road filed an *ex parte* submission with the NRAB allegedly concerning this dispute.[1] On January 8, 1968, the Milwaukee Road advised that effective January 11, 1968, it was going to reestablish the engineers' extra board at Three Forks. When the

1. It was stipulated that action by the NRAB might take 7 years.

change in working conditions became effective the BLF&E instituted limited picketing.

On the same day, January 11, the Milwaukee Road filed this action to enjoin the strike and the district court entered a temporary restraining order. It also ordered the railroad to maintain the status quo by withdrawing its notice of contract change. On February 2, 1968, after trial on the merits, the district court entered its findings of facts and conclusions of law and final judgment dismissing the complaint (A 9-14). The district court found that the provisions of the Act had been exhausted (Fdgs. ¶ 15, A 12), that the dispute giving rise to the actual and threatened strike and picketing is a major dispute and not a minor grievance under the Act (Fdgs. ¶ 21, A 13), and that this case involves or grows out of a labor dispute within the meaning of the Norris-LaGuardia Act (Fdgs. ¶ 22, A 13). The district court concluded as a matter of law that the dispute growing out of the railroad's attempt to cancel the 1956 agreement and re-establish the engineers' extra board was a change in the "rates of pay, rules and working conditions" of the employees represented by the BLF&E, and was therefore a major dispute within the meaning of the Railway Labor Act, *Elgin, Joliet & E. Ry. Co.* v. *Burley,* 325 U. S. 711 (1945), and that since the processes of the Act were exhausted by the parties, they were free to resort to self-help, and the court was without jurisdiction to grant injunctive relief under the Norris-LaGuardia Act, *Brotherhood of Locomotive Engineers* v. *Baltimore & O. Rd. Co.,* 372 U. S. 284, 291 (1963) (A 13-14).

The Court of Appeals reversed. It held that the question of what the new work rules would be after termination of the agreement was a minor dispute and that the Norris-LaGuardia Act did not bar injunctive relief.

On June 21, 1968 Milwaukee Road & BLE entered into

a new agreement effective July 1, 1968, which provided for work assignment seniority rules at Three Forks different from those contained in the 1956 Agreement and different from those in effect before the 1956 Agreement was made. Petitioners did not learn of this new agreement until recently and long after the Court of Appeals denied petitioners' request for rehearing. The new agreement is reproduced at A 27, *infra.*

REASONS FOR GRANTING THE WRIT.

1. *A review of the decision below is imperative so that this Court may stem the erosion of the Norris-LaGuardia Act.*

Ever since this Court held that the Norris-LaGuardia Act does not bar injunctions in labor disputes which are "minor" disputes referred to the NRAB under § 3, First of the Act (*Brotherhood of Rd. Trainmen* v. *Chicago River and I. R.*, 353 U. S. 30 (1957)), there has been a "re-emergence of the labor injunction as a potent force in labor-management disputes involving the railroad and airline industries."[1] If a dispute is "minor" a carrier may be entitled to enjoin a strike.[2] Since the determination of whether a dispute is major or minor has such fateful consequences, the carriers understandably have attempted to maneuver disputes into minor ones and the

1. McGuinn, *Injunctive Powers of the Federal Courts in Cases Involving Disputes Under the Railway Labor Act*, 50 Geo. L. J. 46 (1961).

2. And in an important related context, if the dispute is "major" a union may obtain an injunction under § 2, Seventh of the Act requiring the carrier not to make any changes in rules and work conditions. *United Industrial Workers, etc.* v. *Board of Trustees*, 351 F. 2d 183 (5th Cir. 1965); *Manning* v. *American Airlines, Inc.*, 329 F. 2d 32 (2d Cir.), *cert. denied*, 379 U. S. 817 (1964).

unions into major ones, with varying degrees of success.[1]

Success for a carrier depends on judicial activism, not judicial restraint. It may be assumed that the trial judge was just as concerned about strikes as the members of the Court of Appeals. The difference in result is a consequence of the exaltation of form over substance in order to prevent a strike.

Here the carrier terminated an agreement providing for certain rules and working conditions and sought to impose different rules and working conditions. As a last minute effort to convert this dispute into a minor dispute, the carrier submitted an issue to the NRAB.[2] The NMB and the district judge were not diverted by the carrier's tactic. They saw the dispute for what it was, a major dispute.

The Court of Appeals gave legitimacy to the minor dispute claim by accepting the carrier's assertion set forth in its submission to the NRAB, that "cancellation of the agreement meant only reverting to the conditions which prevailed prior to November 1, 1956." (Appendix of Plaintiff-Appellant below, p. 12.)

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1. See, *e.g.*, *Order of Railroad Telegraphers* v. *Chicago & N. W. Ry. Co.*, 362 U. S. 330 (1960); *United Industrial Workers, etc.* v. *Board of Trustees*, 351 F. 2d 183 (5th Cir. 1965); *Rutland Ry. Corp.* v. *B. L. E.*, 307 F. 2d 21, 33-4 (2d Cir. 1962); *Butte, A. & P. Rd.* v. *BLF&E*, 268 F. 2d 54 (9th Cir.) *cert. denied*, 361 U. S. 864 (1959); *Fla. E. C. Ry.* v. *B. R. T.*, 336 F. 2d 172 (5th Cir. 1964); *Manning* v. *American Airlines, Inc.*, 329 F. 2d 32 (2nd Cir.), *cert. denied*, 379 U. S. 817 (1964); *Norfolk & P. B. L. R. R.* v. *B. R. T.*, 248 F. 2d 34 (4th Cir. 1957), *cert. denied*, 355 U. S. 914 (1958); *Chicago, M. St. P. & P. Rd.* v. *Order of Railway Conductors*, 296 F. 2d 453 (7th Cir. 1961), *cert. denied*, 369 U. S. 844 (1962); *St. Louis, S. F. & T. Ry.* v. *Yardmasters*, 328 F. 2d 749 (5th Cir.), *cert. denied*, 377 U. S. 980 (1964). See also Aaron, *The Labor Injunction Reappraised*, 14 Labor L. J. 41 (1963); McGuinn, n. 1, p. 7, *supra* at 58; Comment, *Jurisdiction of Federal Courts to Enjoin Labor Disputes*, 32 Tenn. L. Rev. 264, 273-4 (1965); and 33rd Annual Report of the NMB (1967), pp. 35-6.

2. The submission was not filed until January 3, 1968. By that date the NMB had taken jurisdiction of the dispute, all the provisions of the Act had been exhausted and the district court on petitioners' motion dismissed without prejudice petitioners' prior action to maintain the status quo.

The most frequently cited distinction between major and minor disputes is that set forth by this Court in *Elgin, Joliet & E. Ry. Co.* v. *Burley*, 325 U. S. 711, 722-24 (1945). There the Court made clear that major disputes relate to "the formation of collective agreements" or "where it is sought to change the terms" of an agreement.[1] That is precisely what this dispute is about. On its face, the termination of an agreement or the proposed termination of an agreement is "an intended change in agreements affecting rates of pay, rules or working conditions * * *" and taken by itself constitutes a major dispute within the plain meaning of § 6 of the Act. But here we have more—a unilateral promulgation of the change.

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1. In *Burley* the Court, however, was not concerned with the major-minor dichotomy vis-a-vis the Norris-LaGuardia Act. This Court, to our knowledge, has never defined a dispute as a minor one under the Railway Labor Act so as to nullify the force of the Norris-LaGuardia Act. The *Chicago River* case concerned an admitted minor dispute. In the *Telegrapher's* case, *supra*, 362 U. S. 330, this Court rejected the carrier notion that a dispute was a minor one to which Norris-LaGuardia was inapplicable. In view of the large number of post-*Chicago River* lower court decisions, many of which appear irreconcilable, relating to major versus minor disputes in the context of the right to injunctive relief (see, *e.g.*, cases cited, n. 1, p. 8, *supra*), this Court should grant *certiorari* to review a concept so vital to the administration of the RLA and the Norris-LaGuardia Act. We observe also that in the *Rutland Railway* case, n. 1, p. 8, *supra*, Mr. Justice (then Circuit Judge) Marshall stated in dissent that the major-minor dichotomy "is of such generality that it fails to pose the problems we must solve in any meaningful fashion." 307 F. 2d at 42. A leading labor law scholar, Benjamin Aaron, has stated that "the changing character of disputes arising under the RLA has tended to destroy whatever useful distinctions were originally implied by the words 'major' and 'minor' " and the classification of such disputes in these terms has become "a sterile exercise in logomachy." Aaron, *The Labor Injunction Reappraised*, 14 Labor L. J. 41, 62, 63 (1963). The distinction is "illusive" and requires "clarity" by this Court. *Id.* at 58. Other commentators have also suggested the need for new guidelines by this Court. See, *e.g.*, Note, *Railway Labor Act—Major and Minor Disputes*, 31 J. of Air Law & C. 371, 376 (1965); Comment, *Jurisdiction of Federal Courts to Enjoin Labor Disputes*, 32 Tenn.

The court below, by ignoring the plain language of § 6 and *Burley*,[1] converted this dispute into a minor one and revived the historic abuses of the judicial process against which the Norris-LaGuardia Act was directed. It is hardly necessary to remind this Court of the importance of the national policy expressed in the Norris-LaGuardia Act. This Court has said that if the scope of the Norris-LaGuardia Act is to be narrowed that is a role not for the courts but for Congress which made coverage of the Act "broad because it wanted it to be broad." *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.*. 362 U. S. 330, 335-6, 342 (1960).

The principal case relied upon by the Court of Appeals, *Transportation-Communications Employees Union* v. *Union Pacific R. Company*, 385 U. S. 157 (1966), is inapposite. There this Court was concerned with an admitted minor dispute and the issue was whether the NRAB had to consider the existing agreements of two contesting unions in

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L. Rev. 264, 274 (1965). The "major-minor" dichotomy has resulted in "incredible judicial contortions," "an incredible muddle," "casuistry" and "fumbling misclassifications of 'major disputes' into 'minor disputes' * * *" Kroner, *Interim Injunctive Relief Under the Railway Labor Act: Some Problems and Suggestions*, 18th Annual Conference on Labor, New York University (1966) 179, 183, 184, 188, 189.

1. The decision below is not only contrary to the teachings of *Burley* but also to decisions of other Courts of Appeals. See, *e.g.*, *Butte, Anaconda & P. Ry.* v. *BRT*, 268 F. 2d 54 (9th Cir. 1959), *cert. denied*, 361 U. S. 864 (carrier's transfer of work from one craft of employees to another was a major dispute); and *United Industrial Workers, etc.* v. *Board of Trustees*, 351 F. 2d 183 (5th Cir. 1965) (carrier's termination of contract by going out of business was a major dispute). Also, under the test enunciated by the majority in *Rutland Ry. Corp.* v. *B. L. E.*, 307 F. 2d 21 at 33-4 (2d Cir. 1962) the dispute here is "major" since the "present agreements . . . contain express provisions contrary to the position taken by the railroad"; and as Circuit Judge (now Mr. Justice) Marshall observed in dissent, once the carrier served a § 6 notice seeking to terminate the agreement the dispute clearly was major. 307 F. 2d 42, 45-8.

order to render a valid and enforceable award. In the case at bar there is no conflict between existing agreements. There was only one joint agreement governing the work. It is an agreement, not a job, which has been terminated. The question now is what the new seniority work rules shall be as to how the same jobs shall be filled since the agreement was terminated.

We do not believe that this Court should permit the distortion of the *T-C E Union* doctrine to nullify the Norris-LaGuardia Act—an issue not at all before the Court in that case.[1]

Because of the interplay between the crafts of engineer and firemen, tri-partite collective agreements are common. Such agreements governing seniority, maximum and minimum mileage, training, and promotion go back more than a half century. Disputes concerning the *making* of such agreements have been held to be non-justiciable by this Court. *General Committee, BLE* v. *Missouri-K-T R. Co.*, 320 U. S. 323 (1940).

2. *The Court of Appeals has erroneously decided an important question of federal law which has not been decided by this Court, namely, whether the decision of the NMB, the agency charged by law with administering the major dispute provisions of the Act, that a dispute is a major one subject to the jurisdiction of the NMB and not the NRAB, is to be given any weight by the courts.*

After the BLF&E invoked the services of the NMB in October, 1966, the BLE and the Milwaukee Road repeatedly urged the NMB not to docket this case as a major dispute under the Act (Fdgs. ¶ 13, A 11-12). They urged that what was involved was an interpretation of contract and

1. In *Brotherhood of Railroad Signalmen* v. *Southern Ry. Co.*, 389 U. S. 958 (1967), Chief Justice Warren, Mr. Justice Fortas and Mr. Justice Marshall would have granted certiorari for the reasons stated in the dissent in *T-C E U.*

therefore a minor dispute over which the NMB had no jurisdiction. After investigation, the NMB made a determination that the dispute arose out of the BLE's notice to cancel the 1956 agreement. It so advised the parties on December 14, 1966: "The Board has previously ruled that similar notices should be handled by the Board as a notice under § 6 of the Act * * *". The NMB thus treated the notice to cancel as a notice under § 6 of the Act. (Fdgs. ¶¶ 11-12, A. 11). The NMB then proceeded to perform its duties under the Act, and after unsuccessful efforts to mediate or obtain an agreement to arbitrate, advised the parties of the status quo provisions of the Act and closed its files.

Charged with the duty of administering the major dispute provisions of the Act, the NMB's decision is entitled to weight. It is a long-established rule that courts must give "appropriate weight to the judgment of those whose special duty is to administer the questioned statute." *N. L. R. B.* v. *Hearst Publications,* 322 U. S. 111, 131 (1944).

The NMB has various functions under the Act. See § 5, First. It is aware that if it determines a dispute is major rather than minor there is greater "potential for interrupting commerce".[1]

During 1967 the NMB handled almost 1,000 cases of all types, two-thirds of which were "major disputes" or mediation cases of the type involved here. Since 1934, the Board has handled over 12,000 cases, two-thirds of which were mediation cases. 33rd Annual Report, *supra,*

1. 33rd Annual Report of the National Mediation Board for the fiscal year ending June 30, 1967, p. 4.

The NMB is aware that the parties sometimes try to have their case viewed through "major or minor lenses" instead of "ordinary glasses" [Cf. *United Industrial Workers* v. *Board of Trustees,* 351 F. 2d 183, 189 (5th Cir., 1965)]. See the NMB's 33rd Annual Report, *supra,* pp. 35-6.

pp. 29-32, 89. This record establishes the NMB's credentials to determine whether a dispute is major or minor. The Board has treated the notice in this case, just as it has treated similar notices in other cases, as a major dispute falling under § 6 of the Act.

The district court gave weight to the determination of the NMB. It recognized the obvious fact that as the national agency concerned with avoiding strikes and lock outs in the railroad industry the NMB would go slow in characterizing a dispute as a major dispute unless it was clearly such a dispute.

The court below did not confront the issue of the NMB's administrative ruling in this case or the NMB's past practice in similar cases. Indeed, its opinion conspicuously fails to state that the NMB determined that the dispute here involved was a major dispute. But silence cannot sweep away the NMB past practice and present determination of its own jurisdiction. We are aware of no prior case in which a court has overturned—overtly or sub-silencio—a decision of the NMB as to its jurisdiction under §§ 5 and 6 of the Act. "Primary jurisdiction to determine whether a dispute is minor or major resides in the agencies established by the Railway Labor Act." *Baltimore & O. Rd.* v. *United Railroad Workers, etc.,* 271 F. 2d 87, 91 (2nd Cir. 1959), vacated on other grounds, 364 U. S. 278 (1960). And when the NMB has refused to docket a dispute as a major one and referred the parties to the NRAB, the courts have followed the NMB's decision. *Norfolk & P. B. L. R. R.* v. *B. R. T.,* 248 F. 2d 34, 43-4 (4th Cir. 1957), *cert. denied,* 355 U. S. 914 (1958); *Atchison, Topeka & Santa Fe R. Co.* v. *BLF&E* (C. D. Calif, 1968), n. 1, p. 17, *infra.*

This issue has continuing importance to the orderly administration of the Act.[1] If the lower courts are to be

1. See, *e.g.,* the *Santa Fe* case, n. 1, p. 17, *infra.*

free to ignore or give weight to the NMB's present and long-standing administrative practice the mandate should come from this Court.

Surely, this Court should not countenance a discriminatory judicial practice which gives effect only to NMB decisions that a dispute is minor and hence enjoinable. The erosion of the Norris-LaGuardia Act, see point 1 above, is in part a result of this practice.

3. *The Court of Appeals' decision is in direct conflict with recent decisions of the Courts of Appeals for the Second Circuit and the District of Columbia Circuit on an issue of great importance in the day-to-day interpretation and application of the Railway Labor Act: do the "rates of pay, rules, or working conditions" set forth in a terminated agreement continue in effect until changed by agreement or in accordance with § 6 and related provisions of the Act?*

The Court of Appeals has held that even though the agreement is silent as to what rules and working conditions shall be in effect after termination, the employer may nevertheless impose rules or working conditions which were in effect prior to the making of the terminated agreement.[1]

1. The rationale of the decision below is found in two paragraphs (A7):

> "The only change in working conditions which could be effected by a termination of the 1956 tri-partite agreement was one whose occurrence was within the contractual contemplation of the parties. The agreement made specific provision for its termination. And it had merely withdrawn one isolated factor of working conditions, the making of the work assignments at Three Forks, from the method prevailing under the existing contractual relationships between the railroad and BLF&E, and BLE, respectively.
>
> "In our opinion a dispute as to whether a termination of the 1956 agreement has the effect of restoring the engineers' extra board at Three Forks, and whether such a restoration constitutes a 'new' working condition, presents only issues which are to be resolved by reference to and interpretation of

This holding is in direct conflict with *Manning* v. *American Airlines, Inc.*, 221 F. Supp. 301 (S. D. N. Y. 1963) *affirmed*, 329 F. 2d 32 (2d Cir.), *cert. denied*, 379 U. S. 817 (1964); and *Brotherhood of Railroad Trainmen* v. *Akron and B. R. R. Co. et al.*, 385 F. 2d 581 (D. C. Cir. 1967), *cert. denied*, 390 U. S. 923 (1968).

These cases hold that under the scheme of the Railway Labor Act even though an agreement is terminated by its own terms or notice of termination, the work rules provided for in that agreement do not terminate. They can be changed after expiration only by agreement or processing under § 6 of the Act. In *Manning* the flight engineers and American Airlines had in force both a basic agreement and a separate agreement for the check-off of union dues. The latter provided that it was to "continue in full force and effect until April 30, 1963, *and shall be subject to renewal thereafter only by mutual agreement of the parties hereto.*" On February 28, 1963 both the union and the carrier served a § 6 notice with respect to the basic agreement. On March 8, 1963, the union served another § 6 notice with respect to the dues check-off agreement. That notice proposed a change which would make the duration of the dues check-off agreement the same as that of the basic agreement. The carrier took the position that the check-off agreement would expire by its own terms on April 30, 1963 and thereafter the carrier discontinued the dues check-off. The district court issued an injunction requiring the carrier to continue the check-off under the terms of the old agreement even though it had expired. The district court rejected the air-

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the related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements. This is particularly true where a jurisdictional dispute over work assignments is involved. The rationale and teaching of *Transportation-Communication Employees Union* v. *Union Pacific Railroad Co.*, 385 U. S. 157, 87 S. Ct. 369, 17 L. Ed. 2d 264, is pertinent in this connection."

lines' argument that to require continuance of the dues check-off would in effect extend the old agreement or make a new agreement for the parties because the old agreement definitely expired on April 30, 1963.

The Court of Appeals affirmed. It rejected the carrier's minor dispute contention and held—in direct conflict with the decision below—that the question of what work rules will be in effect upon the termination of an agreement involves "not 'the interpretation or application' of the * * * agreement, which admittedly expired, * * * but the application of § 6 of the Railway Labor Act." 329 F. 2d at 35. For the convenience of the Court the *Manning* opinion is reproduced in the appendix hereto, pp. A 22 to 26, *infra*.

The *Manning* doctrine formed the rationale of *Brotherhood of Railroad Trainmen* v. *Akron and B. B. R. Co.*, 385 F. 2d 581, 593 (D. C. Cir. 1967), *cert. denied*, 390 U. S. 923 (1968). In our opinion the doctrine was there unsoundly extended to justify holding that work rule changes ordered by a compulsory arbitration board authorized by Congress to fix terms only for a two-year period continued in effect after the two-year period until changed by agreement or by exhausting the processes of the Act. There the unions urged, as does the railroad here, that the work rules in effect prior to the award sprung back into life upon the award's expiration. 385 F. 2d at 593. In that case there was substantial evidence of the intent of the President, the Congress and the parties that the old rules would resume automatically upon the award's expiration.[1] The Court of Appeals in *Akron* stated there was "logic" to the unions' position, but rejected it under the *Manning* doctrine, 385 F. 2d at 593, and this Court denied certiorari.[2]

1. See Petition for Writ of Certiorari of the BLF&E, October Term 1967, No. 859, pp. 4-13.

2. The opinion of the court below fails to mention either of the foregoing cases although both were cited to the court in briefs and

In the instant case the 1956 agreement provided for termination but made no provision for the rules to govern upon termination.[1] To fill that vacuum the lower court jumped to the conclusion that "the only change in working conditions which could be effected by termination of the 1956 tri-partite agreement was one whose occurrence was within the contractual contemplation of the parties." In substance, the court concluded that restoration of the rules in effect prior to the 1956 agreement may not constitute new working conditions because the new rules are the same as the old rules.

Under the *Manning* and *Akron* cases, this position does not have any foundation in the Railway Labor Act. Even if we assume that the post-agreement rules are the same as the pre-agreement rules, they are different rules than those provided for in the terminated agreement.

The crucial fact is there is no provision in the cancelled agreement authorizing restoration of the pre-agreement rules or any other rules. Nor is there any basis for the court's conclusion that there is validity to the railroad's contention that the cancellation of the agreement meant

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oral argument, and the railroad in its brief below stated the *Manning* case was "most heavily" relied upon by petitioners.

1. It is possible for parties to a collective agreement to provide a method for termination and also to provide what rules shall be in effect upon termination. In such a case the doctrine of the *Manning* case is inapplicable. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Brotherhood of Locomotive Firemen and Enginemen* (April 23, 1968, C. D. Calif. No. 68-332F), appeal dismissed. In that case a tri-partite agreement provided: "This agreement * * * shall continue in effect for a period of two years and subsequent thereto subject to the right of any of the parties * * * to serve ten days' written notice of desire to return to the schedule as printed, whereupon at the expiration of the ten days, schedule rules will automatically go into effect." The NMB held that it could find "no basis for docketing the request" as a major dispute under § 6 of the Act. The district court gave weight to the NMB's decision and held the dispute was a minor one.

only reverting to the conditions which prevailed prior to November, 1956. The railroad & BLE repudiated the court below by their agreement made several days prior to the decision of the lower court providing a method of assigning engineers different from the rules which existed prior to 1956 and different from the 1956 agreement itself.[1]

CONCLUSION.

For the reasons hereinabove stated, petitioners respectfully request that this Court issue a Writ of certiorari to the Court of Appeals for the Seventh Circuit and reverse the judgment of that Court.

Respectfully submitted,

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November 4, 1968.

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1. As set forth in the Statement of Facts, this agreement (A 27, *infra*) was not brought to the lower court's attention and the petitioners were unaware of its existence until very recently. The validity of the new agreement is not before the Court: *E.g.*, we exclude from consideration the fact that the agreement was made in violation of the agreement of the parties to maintain the *status quo, i.e.*, the 1956 agreement pending disposition of the appeal.

Appendix

APPENDIX.

OPINION BELOW.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

July 2, 1968.

Before CASTLE, *Chief Judge,* and KILEY and FAIRCHILD, *Circuit Judges.*

CASTLE, *Chief Judge.* The plaintiff-appellant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, instituted this action in the District Court against the defendants-appellees, Brotherhood of Locomotive Firemen and Enginemen (BLF&E) and the Brotherhood's Vice President, M. A. Ross, and General Chairman, W. H. Wilkerson. Subsequently, a motion by the plaintiff railroad to join the Brotherhood of Locomotive Engineers (BLE) as a defendant[1] was allowed by the District Court. The railroad's complaint sought injunctive relief against a threatened strike or work stoppage by BLF&E. The court issued a temporary restraining order which also required the railroad to maintain the status quo, and following a combined hearing on the issuance of a preliminary injunction and upon the merits, made and en-

1. BLE although nominally designated a defendant supported the position taken by the railroad. On appeal it was permitted to file a brief *amicus curiae.*

tered findings of fact and conclusions of law upon which it based a judgment order dismissing the railroad's complaint. The railroad appealed.

The District Court found that the dispute out of which the litigation arose related to and was generated by an attempt by the railroad, at the request of BLE, to cancel a November 1, 1956, tri-partite agreement between the railroad, BLF&E and BLE governing the work assignment seniority of engineers and firemen at Three Forks, Montana, in the railroad's East Rocky Mountain Seniority District, and to re-establish an engineer's extra board at the Three Forks, Montana, point on its lines. The court concluded that inasmuch as the dispute involved a change in working conditions of employees represented by BLF&E it was a major dispute within the meaning of the Railway Labor Act and since the mediation services of the National Mediation Board, invoked by BLF&E, had been exhausted without resolving the dispute the BLF&E was free to resort to self-help, and the court was without jurisdistion to grant injunctive relief, such jurisdiction having been withdrawn by the Norris-LaGuardia Act, 29 U. S. C. A. § 104.

The sole contested issue on appeal is whether under and for the purposes of the Railway Labor Act (45 U. S. C. A. § 151 et seq.) the dispute here involved is a "major" dispute or a "minor" dispute. If it is the latter the dispute is a matter subject to submission to the National Railroad Adjustment Board for final and binding resolution—a form of compulsory arbitration—and the Norris-LaGuardia Act does not bar injunctive relief. *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R. R. Co.*, 353 U. S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622.

The difference which distinguishes "minor" disputes, over which the National Railroad Adjustment Board has

exclusive jurisdiction, from "major" disputes, the procedures for resolution of which are prescribed in § 6 of the Railway Labor Act, 45 U. S. C. A. § 156, is set forth in *Elgin, J. & E. Ry. Co.* v. *Burley,* 325 U. S. 711, 722-724, 65 S. Ct. 1282, 1289-1290, 89 L. Ed. 1886. In *Hilbert* v. *Pennsylvania R. R. Co.,* 7Cir., 290 F. 2d 881, 883, this Court characterized that difference as follows:

> "'Major disputes' encompass those differences arising out of proposals for new contracts or of changes in existing contractual or legal obligations and relations. They arise where there is no collective bargaining agreement or where it is sought to change the terms of one. In such a case, the issue cannot be resolved by reference to an existing agreement.
>
> "'Minor disputes', on the other hand, are grievances or other differences arising out of the application or interpretation of an existing collective bargaining agreement. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation. See *Elgin, J. & E. Ry. Co.* v. *Burley,* 325 U. S. 711, 722, 65 S. Ct. 1282, 89 L. Ed. 1886."

But, as recently observed in *Southern Railway Company* v. *Brotherhood of Locomotive Firemen and Enginemen,* D. C. Cir., 384 F. 2d 323, 327:

> "This distinction, however, like many others in the law, is more easily stated than applied."

With the above quoted definitions and admonition in mind we turn to consideration of what the record shows with respect to the nature and background of the dispute here involved.

For many years prior to 1956, there existed on the Milwaukee railroad a seniority district known as the East Rocky Mountain Seniority District with headquarters at Three Forks, Montana. Railroad engineers on this senior-

ity district are represented by BLE. Firemen on this district are represented by BLF&E. It has been the custom for employees hired as firemen, after training, education, experience and examination required by the railroad, to be promoted from firemen to engineers. After such promotion, however, employees serve as engineers only at such times as engineer openings are available, by virtue of seniority rules, and when no such openings are available, they serve as firemen. Upon such promotion, when the needs of the service required, firemen would serve first on the engineers' "Extra Board" and thereafter, when their seniority warranted, would receive permanent assignments as engineers. Engineers on the extra board had no permanent assignments but served when a regularly assigned engineer was unavailable for service due to sickness, accident, holiday, vacation, or other reasons.

Thus, for many years the interplay[2] between crafts of engineers and firemen, the promotion and demotion of engineers and firemen, their dual seniority rights, the ebb and flow or movement from the firemen's craft up to the engineers' craft, have been controlled by rules relating to extra boards.

In about 1956 work opportunities for engineers on the Three Forks engineers' extra board declined due to replacement of steam power by diesel power and other factors. The result was that engineers on the extra board had substantially less work opportunities. At the same time there were substantial employment opportunities for firemen who in general had less seniority than engineers. Upon request of BLE and after a vote authorizing such action had been taken of all firemen and engineers on the seniority

2. This interplay has been the subject of a number of decisions. See: *General Committee, B.L.E.* v. *Missouri-K-T. R. Co.*, 320 U. S. 323; *Hooser* v. *Baltimore & Ohio R. Co.*, 7 Cir., 279 F. 2d 197; *McElroy* v. *Terminal R. R. Ass'n of St. Louis*, 7 Cir., 392 F. 2d 966.

district, BLE, BLF&E and the railroad entered into a tri-partite agreement which became effective November 1, 1956. The agreement provided, in general, that the engineers' extra board at Three Forks would be abolished and that the engineers on that extra board would work as firemen. When there was need for services of an engineer who formerly would have been taken from the engineers' extra board, the senior firemen available would be called for the position. The agreement thus established a variance from the normal rules governing the method of handling work assignments involving interplay and ebb and flow between the crafts.

The agreement contained the following provision:

> "K. This agreement effective November 1, 1956, applies only on the East Rocky Mountain Seniority District, and is subject to cancellation on 30 days' written notice by any party signatory hereto."

On September 7, 1966, BLE served notice on the railroad to cancel the agreement of November 1, 1956, according to paragraph K thereof, and to restore the engineers' extra board at Three Forks, Montana, effective October 10, 1966. BLF&E protested cancellation of the agreement claiming that it could not be terminated except with the concurrence of all the parties thereto and that a referendum of all engineers and firemen at Three Forks was necessary in order to terminate the agreement. On October 4, 1966, BLF&E filed an application with the National Mediation Board for its mediation services in connection with the dispute over the proposed cancellation and restoration of the extra board. On October 10, 1966, the BLF&E filed a complaint in the District Court seeking to enjoin the railroad from cancelling the agreement until all provisions of the Railway Labor Act had been exhausted.[3] The Na-

3. BLF&E's October 10, 1966, action was dismissed without prejudice on January 3, 1968.

tional Mediation Board terminated its services on November 7, 1967. On January 3, 1968, the railroad filed an ex parte submission of the dispute with the National Railroad Adjustment Board, and on January 8, 1968, advised that effective January 11, 1968, the engineers' extra list at Three Forks would be restored. On January 11, 1968, the BLF&E commenced picketing which had the effect of stopping certain portions of the railroad's operations, and the complaint in the instant action was filed.

The findings of the District Court disclose that BLF&E's original protest to the railroad concerning the cancellation of the 1956 tri-partite agreement which created a variance in the method of handling work assignments, applicable solely at Three Forks, was made on the ground that termination of the agreement required the concurrence of all the parties thereto and a favorable referendum of all engineers and firemen at Three Forks. In view of the provision made in paragraph K of the agreement, this, of course, involved only a matter of contract interpretation—a classic example of a minor dispute.

On brief in this Court BLF&E assumes, arguendo, that the railroad did have the right to terminate the 1956 agreement and that it has been effectively cancelled, but asserts that such cancellation does not give the railroad "the right to impose new working conditions on the firemen" by re-establishing the engineers' extra board at Three Forks without making a new agreement or exhausting the major dispute provisions of the Railway Labor Act. It is on the basis of the premise that the railroad sought to impose "new working conditions" following termination of the 1956 agreement that BLF&E concludes that the dispute is a major dispute and, consequently, when thirty days elapsed after the National Mediation Board terminated its services, without the establishment of an emergency board,

the railroad was free to re-establish the engineer's extra board at Three Forks, but BLF&E is authorized to resort to a strike without interference by injunction.

The only change in working conditions which could be effected by a termination of the 1956 tri-partite agreement was one whose occurrence was within the contractual contemplation of the parties. The agreement made specific provision for its termination. And it had merely withdrawn one isolated factor of working conditions, the making of the work assignments at Three Forks, from the method prevailing under the existing contractual relationships between the railroad and BLF&E, and BLE, respectively.

In our opinion a dispute as to whether a termination of the 1956 agreement has the effect of restoring the engineers' extra board at Three Forks, and whether such a restoration constitutes a "new" working condition, presents only issues which are to be resolved by reference to and interpretation of the related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements. This is particularly true where a jurisdictional dispute over work assignments is involved. The rationale and teaching of *Transporation-Communication Employees Union* v. *Union Pacific Railroad Co.*, 385 U. S. 157, is pertinent in this connection. It was there pointed out (385 U. S. pp. 160-161):

> "A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, 550; *cf. Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192. '. . . (I)t is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new com-

> mon law—the common law of a particular industry or of a particular plant.' *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 578-579. In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements. This is particularly true when the agreement is resorted to for the purpose of settling a jurisdictional dispute over work assignments."

We therefore conclude that the dispute here involved is a minor dispute.

Accordingly, we hold that the District Court erred in concluding that the Norris-LaGuardia Act, 29 U. S. C. A. § 104, deprived it of jurisdiction to entertain the railroad's complaint for injunctive relief.

A motion of the defendants-appellees to strike a portion of the reply brief of plaintiff-appellant as not being addressed to an issue within the scope of the appeal, nor directed to matter in reply to questions discussed in appellees' brief, was taken with the case. Inasmuch as our disposition of the appeal is in no manner grounded on a resolution of that issue we decline to extend this opinion to encompass the discussion an expository ruling on the motion would necessarily entail. The basis of our opinion makes the matter of no import. We treat it as being moot.

The judgment order of the District Court dismissing the plaintiff-appellant's complaint is reversed, and the cause is remanded to the District Court for further proceedings consistent herewith.

REVERSED AND REMANDED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

This cause coming on for hearing on motion of plaintiff, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, for a preliminary injunction, and the Court having considered Briefs and Memoranda; and having heard testimony and oral arguments of counsel; and being fully advised; makes the following Findings of Fact, and states the following Conclusions of Law:

Findings of Fact.

1. This suit is brought under the Interstate Commerce Act, the Railway Labor Act, and 28 U. S. C., Sections 1331 and 1337. The amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

2. The plaintiff, Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter referred to as the Milwaukee Road), is a common carrier within the meaning of the Railway Labor Act, with its principal office and place of business in Chicago, Cook County, Illinois.

3. The defendant, Brotherhood of Locomotive Firemen and Enginemen (hereinafter referred to as the BLF&E), is an unincorporated labor organization within the meaning of the Railway Labor Act, and is the recognized collective bargaining representative of the craft or class of locomotive firemen employed by the Milwaukee Road.

4. The defendant, Brotherhood of Locomotive Engineers (hereinafter referred to as the BLE), is an unincorporated labor organization within the meaning of the

Railway Labor Act, and is the duly certified collective bargaining representative of the craft or class of locomotive engineers employed on the Milwaukee Road.

5. The plaintiff, Milwaukee Road, the defendant BLF&E and the defendant BLE are parties to an Agreement dated the 1st day of November, 1956.

6. The agreement concerns the method of filling engineers' job vacancies and provides for abolishing the engineers' extra list at Three Forks, Montana. Paragraph K of the agreement states:

> "K. This agreement effective November 1, 1956, applies only to the East Rocky Mountain Seniority District, and is subject to cancellation on 30 days written notice by any party signatory hereto."[1]

7. On or about September 7, 1966, the local chairman of the Engineers served notice on the Milwaukee Road to cancel the agreement of November 1, 1956 according to Paragraph K thereof, and to restore the engineers' extra board at Three Forks, Montana, effective October 10, 1966. (Ex. B to BLF&E's Ex. 1.)

8. On November 17 and 27, 1966, the BLF&E protested the cancellation of the foregoing agreement contending that said agreement could not be terminated except with the concurrence of all the parties to the agreement and that a referendum of all the engineers and firemen at Three Forks was necessary in order to terminate the agreement (Exs. C, D, and E to BLF&E's Ex. 1).

9. On or about October 4, 1966, the BLF&E filed an application with the National Mediation Board (hereinafter referred to as the NMB) for its mediation services,

1. A copy of the agreement is attached as an exhibit to the answer filed by defendant BLF&E. It is exhibit A to BLF&E's exhibit 1. All 15 exhibits attached to BLF&E's answer were admitted into evidence on the stipulation of the parties.

which application set forth as the question in dispute: "Cancellation by the Brotherhood of Locomotive Engineers of the Tripartite agreement dated November 1, 1956, between the BLF&E, BLE and CMStP&P Railroad. The 1956 Agreement discontinued engineers' extra board at Three Forks, Montana, and cancellation would re-establish engineers' extra board at that point." (Ex. F to BLF&E's Ex. 1.)

10. On October 10, 1966, the BLF&E filed a complaint against the Milwaukee Road in the United States District Court for the Northern District of Illinois captioned "Brotherhood of Locomotive Firemen and Enginemen, and William H. Wilkerson, plaintiffs, vs. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, defendant, No. 66 C 1812." That complaint sought to enjoin the Milwaukee Road from cancelling the Three Forks agreement until all provisions of the Railway Labor Act had been exhausted. (BLF&E's Ex. 1) On December 13, 1966, Engineers were permitted to intervene as a defendant in that action. From the time that suit was commenced on October 10, 1966 until January 3, 1968, when that action was dismissed without prejudice, all of the parties thereto agreed to maintain the status quo.

11. The NMB treated the notice to cancel the agreement as a notice under Section 6 of the Railway Labor Act of an intended change in agreements affecting rates of pay, rules, or working conditions (BLF&E's Ex. 5).

12. The NMB proceeded in accordance with Section 5 of the Railway Labor Act which provides for using its best efforts, by mediation, to settle disputes concerning such proposed changes in working conditions. Such disputes are major disputes within the meaning of the Railway Labor Act.

13. At all times relevant, the BLE and the Milwaukee

Road have contended that this was a minor dispute within the meaning of the Railway Labor Act and that such a dispute was not properly before the NMB. The BLF&E at all times has contended that this was a major dispute properly before the NMB.

14. By letter dated November 7, 1967, the NMB advised the parties that:

> "It is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement.
>
> "In these circumstances, notice is hereby served in behalf of the Board that its services (except as provided in Section 5, Third, and in Section 10 of the law) have this day been terminated under the provisions of the Railway Labor Act." (BLF&E's Ex. 13)

15. The status quo provisions of the Railway Labor Act are no longer in effect since the Court finds that 30 days have passed since the NMB terminated its services and the parties have stipulated that the President has not been notified concerning the establishment of an emergency board under the provisions of Section 10 of the Act and no such Board has been created.

16. On or about January 3, 1968, the Milwaukee Road filed an ex parte submission with the National Railroad Adjustment Board concerning this dispute. The parties have stipulated that action by the Adjustment Board might take 7 years. (A copy of the submission before the Adjustment Board is attached as Exhibit A to plaintiff's complaint.)

17. By letter dated January 8, 1968, the Milwaukee Road advised that effective January 11, 1968, it was going to "re-establish the engineers' extra list at Three Forks, Montana," thus giving effect to the cancellation of the tri-partite agreement. (BLF&E's Ex. 15)

18. At the same time on January 11, 1968, when the Milwaukee Road made effective the changes in the working conditions of the employees represented by the BLF&E, the BLF&E instituted picketing at certain points on the plaintiff's property (western region), which picketing had the effect of stopping certain portions of plaintiff's railroad's operations.

19. If the Milwaukee Road were again to attempt to place into effect the engineers' extra list at Three Forks, Montana, and if the BLF&E were to resume picketing or strikes in response thereto, the Milwaukee Road would suffer irreparable injury.

20. If the Milwaukee Road were to put into effect the engineers' extra list at Three Forks, Montana, employees represented by the BLF&E who are employed by the Milwaukee Road at Three Forks, Montana, would suffer irreparable injury.

21. The dispute giving rise to the actual and threatened strike and picketing is a major dispute and not a minor grievance under the Railway Labor Act.

22. This case involves or grows out of a labor dispute within the meaning of the Norris-LaGuardia Act (29 U. S. C. § 113).

CONCLUSIONS OF LAW.

1. The dispute out of which this litigation arises relates to and was generated by the attempt by the Milwaukee Road, at the request of the Engineers, to cancel the agreement of November 1, 1956 and to re-establish an engineers' extra board at Three Forks, Montana, thereby changing or attempting to change the working conditions of the employees represented by the BLF&E.

2. The dispute here involved is a major dispute within the meaning of the Railway Labor Act since it relates to

an attempt by the carrier to change "rates of pay, rules and working conditions." 45 U. S. C. § 156; Elgin, Joliet & Eastern Railway Company *vs.* Burley, 325 U. S. 711 (1945).

3. After the BLF&E invoked the services of the NMB regarding the dispute here in question, the processes of the Railway Labor Act were exhausted by the parties. Since the Milwaukee Road and the BLF&E have exhausted the processes of the Railway Labor Act, they are free to resort to self-help. Brotherhood of Locomotive Engineers *vs.* Baltimore & Ohio Railroad Company, 372 U. S. 284, 291 (1963).

4. The Court is without jurisdiction to grant injunctive relief to plaintiff, such jurisdiction having been withdrawn by the Norris-LaGuardia Act, 29 U. S. C. § 104.

5. The complaint fails to state a claim upon which relief can be granted.

Enter:

/s/ Alexander J. Napoli,
United States District Judge.

Dated: February 2nd, 1968.

STATUTES INVOLVED.

Norris-LaGuardia Act, §§ 1, 2, 4, 7, 8 and 13(a)(c); 29 U. S. C. §§ 101, 102, 104, 107, 108 and 113(a)(c):

Section 1. Norris-LaGuardia Act.

"No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter." 29 U. S. C. § 101.

Section 2. Norris-LaGuardia Act.

"In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation

of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted." 29 U. S. C. § 102.

Section 4. Norris-LaGuardia Act.

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title." 29 U. S. C. § 104.

Section 7. Norris-LaGuardia Act.

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

"Such hearing shall be held after due and personal

notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

"The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable no[illegible], the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity." 29 U. S. C. § 107.

Section 13(a) and (c), Norris-LaGuardia Act.

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U. S. C. § 113(a)(c).

Railway Labor Act, §§ 2, First, Seventh, 3 First (i), 5, First and 6; 45 U. S. C. §§ 152, First, Seventh, 153, First (i), 155, First and 156:

Section 2, First, of the Railway Labor Act.

"First. It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the opera-

tion of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U. S. C. § 152, First.

Section 2, Seventh, of the Railway Labor Act.

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act." 45 U. S. C. § 152, Seventh.

Section 3, First (i) of the Railway Labor Act.

"There is hereby established, a Board to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." 45 U. S. C. § 153, First (i).

Section 5, First, of the Railway Labor Act:

"The parties, or either party, to a dispute between an employee or group of employees, and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions, or established practices in effect prior to the time the dispute arose." 45 U. S. C. § 155, First.

Section 6 of the Railway Labor Act.

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with refer-

ence thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board." 45 U. S. C. § 156.

IN THE UNITED STATES COURT OF APPEALS

For the Second Circuit.

Manning v. American Airlines, Inc.

329 F. 2d 32 (2nd Cir.) cert. denied, 379 U. S. 817 (1964).

Before *Lumbard,* Chief Judge, and *Medina* and *Friendly,* Circuit Judges.

Friendly, Circuit Judge.

This appeal concerns another phase of the controversy between American Airlines, Inc. and its flight engineers discussed in the opinions in *Ruby* v. *American Airlines, Inc.,* 2 Cir., 329 F. 2d 11. At the same time that it signed the basic agreement of May 1, 1958, with its Chapter of Flight Engineers' International Association, which was to "continue in full force and effect until April 30, 1963 and shall renew itself without change until each successive April 30 thereafter unless written notice of intended change is served in accordance with Section 6, Title I, of the Railway labor Act, as amended, by either party hereto at least sixty (60) days prior to April 30 in any year after April 30, 1962," American executed another agreement for the check-off of union dues of engineers who signed a prescribed authorization form. This check-off agree-

ment was to "continue in full force and effect until April 30, 1963, and shall be subject to renewal thereafter only by mutual agreement of the parties hereto." American's February 28, 1963 "opener" under the basic agreement excluded "the dues-checkoff agreement which expires of its own terms on April 30, 1963." Although the Chapter's February 28 "opener" did not refer to the check-off agreement, the Chapter gave notice on March 8 of a desire to change the latter so that it would have a termination date and a self-renewal clause similar to the proposed new basic agreement. American discontinued the check-off of dues on May 1, 1963. In an action brought by the Chapter, Judge Wyatt issued an order directing it to resume this, from which it appeals.

Validity of the order turns primarily on § 6 of the Railway Labor Act, 45 U. S. C. § 156. The first sentence of that section requires 30 days' written notice of "an intended change in agreements affecting rates of pay, rules, or working conditions." The second sentence says that where such notice has been given, and in certain other instances not here material, "rates of pay, rules, or working conditions shall not be altered by the carrier" until the controversy has been finally acted upon by the Mediation Board or until a lapse of ten days after conferences without request for or proffer of its services—events which have not here occurred.

The propriety of an injunction to enforce the then unique provisions of the Railway Labor Act for maintaining the *status quo* while the parties to a labor dispute pursue various stages of negotiation, mediation or arbitration, was established long ago. *Texas & N. O. R. R.* v. *Brotherhood of Ry. Clerks,* 281 U. S. 548, 565-566, 50 S. Ct. 88, 74 L. Ed. 608 (1930). Although the Texas & N. O. decision antedated the Norris-LaGuardia Act, 29 U. S. C. §§ 101-115, the debates on that Act, 75 Cong. Rec. 5503-04 (1932), made

clear that it was not intended to apply to injunctions of this nature. See *Railroad Yardmasters* v. *Pennsylvania R. R.*, 224 F. 2d 226 (3 Cir. 1955); *Chicago, R. I. & P. R. R.* v. *Switchmen's Union*, 292 F. 2d 61, 63-64, 66 (2 Cir. 1961), cert. denied, 370 U. S. 936, 82 S. Ct. 1578, 8 L. Ed. 2d 806 (1962).

American's principal argument, in which it is joined by the Air Transport Association of America as *amicus curiae*, is that § 6 is inapplicable because the check-off is a "specialized" agreement with a fixed termination date and without the self-renewal provisions of the basic agreement. Stated so broadly the argument is wholly without force. The effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination. If the basic agreement of 1958 had no automatic renewal clause, § 6 would have nonetheless applied; unless the terms of the agreement were still to be followed there would be "an intended change," which would bring into play the thirty-day notice provision of § 6 and with it the requirement of the second sentence that the *status quo* be maintained until compliance with all the demands of the section was had. Indeed, the current effectiveness of the wage and hour clauses of the basic agreement, which American does not contest, is due solely to the second sentence of § 6, since automatic renewal was prevented by the openers.

A stronger form of the argument is that the contrast of the language of the check-off agreement—"shall be subject to renewal thereafter only by mutual agreement of the parties hereto"—with the automatic renewal language of the basic agreement, and of two side agreements, warrants the conclusion that the parties did not mean § 6 to apply. Passing the question whether and how parties subject to the Railway Labor Act can lawfully make agreements "affecting rates of pay, rules or working condi-

tions'' so that these will not be subject to § 6, as might be convenient when unusual situations of short duration arise within the period of a basic contract, we think the argument puts more strain on the words of the check-off agreement than these will bear. In our view the different language meant only that automatic renewal of the basic agreement would not carry the check-off agreement along with it. It is no answer that § 6 thus gives identical effect to two intentionally dissimilar provisions; the very purpose of § 6 is to stabilize relations by artificially extending the lives of agreements for a limited period regardless of the parties' intentions.

American was thus required to maintain the check-off if, but only if, this comes within the phrase ''rates of pay, rules, or working conditions''—a phrase in § 6 which springs from the original Railway Labor Act of 1926, 44 Stat. 582, and was left unchanged when the Act was amended in 1934, 48 Stat. 1197. We see little force in American's claim that Congress could not have intended a check-off agreement to be comprehended by these words since § 2 Fourth of the Railway Labor Act made all such agreements unlawful until § 2 Eleventh was added in 1951, 64 Stat. 1238. A statute taxing ''beverages,'' enacted during the prohibition era, would surely include hard drinks when these became lawful, as well as soft ones. But the question remains whether an agreement which, as American argues, affects only the employees' relations with their union, as distinguished from matters such as hours, seniority or safety, is a ''working condition.''

We are persuaded that it is. ''Working conditions'' is a broad term. The Act uses the same phrase ''rates of pay, rules, or working conditions'' in §§ 3 First (i) and 204, 45 U. S. C. §§ 153 First (i) and 184, relating to boards of adjustment, where the desire was rather plainly to be as comprehensive as possible; we find it difficult to believe

that if during the term of the agreement the Chapter had complained of an inadequacy in the check-off and had refused to submit the issue to a board of adjustment, American would not have thought itself entitled to the powerful remedy which the Act gives when a union declines to arbitrate such a dispute. See *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R. R.*, 353 U. S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622 (1937). The check-off has been held to come within the provisions of the National Labor Relations Act, §§ 8(a) (5) and 9(a), requiring an employer to bargain with the employees' designated representative "in respect to rates of pay, wages, hours of employment, or other conditions of employment." *N. L. R. B.* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 136 (1 Cir.), cert. denied, 346 U. S. 887, 74 S. Ct. 139, 98 L. Ed. 391 (1953); cf. *Switchmen's Union of North America* v. *Southern Pac. Co.*, 253 F. 2d 81, 84 (9 Cir.), cert. denied, 358 U. S. 818, 79 S. Ct. 29, 3 L. Ed. 2d 60 (1958). The purpose of § 6 was to prevent rocking of the boat by either side until the procedures of the Railway Labor Act were exhausted; interpreting "working conditions" to include an agreed check-off accomplishes that purpose better than a narrower construction.

American's claim that the controversy was within the exclusive jurisdiction of the board of adjustment under § 204 overlooks that what is here involved is not "the interpretation or application" of the check-off agreement, which admittedly expired on April 30, 1963, but the application of § 6 of the Railway Labor Act. The many other arguments advanced do not warrant discussion.

Affirmed.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company
374 Union Station Bldg.—Chicago, Illinois 60606

S. W. Amour
Vice President—Labor Relations

June 21, 1968

Mr. G. H. Russ,
General Chairman—BLE
4603 North 9th Street,
Tacoma, Washington.

Dear Sir:

In connection with the regulation of an engineers' pool, where no extra engineers' board is maintained, in case of an unfilled engineer vacancy in the pool, the engineer in the pool standing next out will carry the vacant pool turn with him as well as his own, and upon his return to the home terminal the vacant turn will occupy the same relative position in the pool as before.

This understanding is effective July 1, 1968, and is subject to cancellation upon ten (10) days notice by either party.

Will you kindly indicate your concurrence in the space provided below.

Yours very truly,

S. W. Amour,
Vice President—Labor Relations.

I Concur:
G. Russ,
General Chairman—BLE.
cc: Mr. R. E. Delaney